No. 83-179

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EDWARD R. POSEY,

Petitioner,

v.

SKYLINE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in the face of Skyline's direct and unambiguous evidence that the notice required by the Age Discrimination in Employment Act ("ADEA") was conspicuously and continuously posted at Posey's place of employment, Posey's affidavit stating that he never saw the notice creates a genuine issue of material fact with respect to an equitable tolling of the ADEA's 180-day time limitation for filing a charge with the Equal Employment Opportunities Commission ("EEOC").

2. Whether, if Posey may otherwise invoke the equitable tolling doctrine, the ADEA's time limitation for filing a charge nevertheless began to run when Posey retained an attorney in connection with his employment termination.

3. Whether the District Court had jurisdiction over Posey's action under the ADEA when no charge was filed with the EEOC before the action was commenced.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Edward R. Posey ("Posey") is a former employee of respondent Skyline Corporation ("Skyline"), and was most recently employed as plant manager of Skyline's

*Skyline Corporation is an Indiana corporation. It has no parent companies, non-wholly owned subsidiaries or affiliates. This statement is submitted in compliance with Supreme Court Rule 28.1.

Goshen, Indiana plant. For purposes of the proceedings in the courts below, it has been assumed, based upon Posey's evidence, that Skyline first notified Posey on June 4, 1979, that his employment had been terminated.

On October 10, 1980, Posey commenced this action in the United States District Court for the Northern District of Indiana, South Bend Division, alleging that in terminating his employment, Skyline had discriminated against him on the basis of age in violation of the Age Discrimination In Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (1976), and the Civil Rights Act of 1866, 42 U.S.C. § 1981.[1] The ADEA provides for a private cause of action to be brought by persons aggrieved by reason of discrimination in employment on the basis of age. 29 U.S.C. § 626(c) (Supp. V 1981). The Act further provides that:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Commission. Such a charge shall be filed—
>
> (1) within 180 days after the alleged unlawful practice occurred . . . .

Id., § 626(d). According to Posey's evidence, he first filed such a charge on February 25, 1981.

On December 22, 1980, Skyline moved for summary judgment on Posey's complaint on the ground that Posey had not complied with the requirements of § 626(d). Skyline urged three bases in support of its motion.

First, Posey had not filed a charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days of his termination as required by § 626(d). Furthermore,

[1]The District Court granted Skyline's motion for summary judgment on Posey's § 1981 claim on the ground that he did not allege discrimination on the basis of race. Petitioner's Appendix ("Pet. App.") at C-6—C-7. Posey did not appeal that issue.

although the Court of Appeals for the Seventh Circuit had previously held that the 180-day limitation may be equitably tolled by an employer's "failure to post conspicuously notice of ADEA rights" as required by 29 U.S.C. § 627 and pertinent administrative regulations thereunder, *Kephart v. Institute of Gas Technology*, 581 F.2d 1287, 1289 (7th Cir. 1978), there was no basis for equitably tolling the running of the limitation period in this case.[2]

In support of this ground for its motion, Skyline submitted the affidavit of Delven D. Herr, division manager of Skyline's Goshen plant, which stated on personal knowledge that the required notices of ADEA rights had been posted in the employee's lunch room at the Goshen plant continuously since February 19, 1977. Herr Afidavit ¶¶ 6-7 (Respondent's Appendix ("Res. App."), *infra*, at A-1—A-2). Skyline also submitted the affidavit of Robert F. Szrom, Skyline's Vice President of Human Resources, which stated that Skyline's business records also indicated that the requisite notices of ADEA rights had been posted in the Goshen plant continuously since at least August, 1976. Szrom Affidavit ¶¶ 3-5 (Res. App. at A-3).

In opposition to this ground for Skyline's motion, Posey submitted his own affidavit which established that he had received notification of the termination of his employment no later than June 4, 1979. Posey Affidavit ¶ 8 (Res. App. at A-7). With respect to the equitable tolling issue, Posey's

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[2]The original version of § 626(d) required giving "sixty days' notice" to the Secretary of Labor "of an intent to file [an] action," 42 U.S.C. § 626(d) (1976), and § 627 refers to the posting of notice as required by the Secretary of Labor. All functions vested in the Secretary of Labor were transferred to the Equal Employment Opportunity Commission by § 2 of the 1978 Reorganization Plan No. 1, 43 F.R. 19807, 92 Stat. 3781. Section 626(d) was formally amended in 1978 to require that "a charge alleging unlawful discrimination . . . [be] filed with the Commission." 42 U.S.C. § 626(d) (Supp. V 1981). Section 627 has not been amended and continues to refer to the posting of a notice as required by the Secretary of Labor.

affidavit averred that "he frequently, i.e., almost every working day, glanced at the posters . . . in the employee's lunch room . . . [at] the Goshen plant . . ., and promptly read any new posted notices, and . . . never saw and does not recall ever reading [an ADEA] notice . . . as stated in the affidavits of Robert F. Szrom and Delvin D. Herr." Posey Affidavit ¶ 16 (Res. App. at A-9).

As a second ground in support of its motion, Skyline urged that even were the equitable tolling doctrine invoked, Posey still had not met the limitation period for filing a charge. The Seventh Circuit's decision in *Kephart* held that once equitable tolling is invoked, "the 180-day period will begin to run when the employee *either retains an attorney* or acquires actual knowledge of his rights under the ADEA." 581 F.2d at 1289 (emphasis added). In support of this ground, Skyline submitted the affidavit of John R. Lutz, Skyline's Assistant General Counsel, which attached and authenticated, *inter alia*, a letter to Lutz from John J. Gaydos, Posey's attorney, dated July 14, 1980. In that letter, Posey's attorney referred to a July 3, 1980, telephone conversation between Lutz and Gaydos "regarding termination of Edward R. Posey." Lutz Affidavit (Res. App. A-12—A-13). Using either date as the reference, Posey had not met even an equitably tolled 180-day limitation period for filing a charge.

In opposition to this ground, Posey submitted no evidence contradicting Skyline's evidence. Furthermore, Posey's own affidavit stated that he had in fact first contacted his attorney on April 7, 1980, more than two months before the date established by Skyline's evidence. Posey Affidavit ¶ 19 (Res. App. at A-9).

As a third ground for its motion, Skyline urged that apart from the 180-day limitation period issue, Posey had never filed a charge with the EEOC before commencing this action on October 10, 1980, let alone the 60 days before as required by the statute. 29 U.S.C. § 626(d). Indeed, at the time Skyline's motion was filed, Posey had never filed such a charge at all. In his affidavit opposing Skyline's motion, Posey stated that he

had first sent notice of his charge to the Secretary of Labor on February 25, 1981, Posey Affidavit ¶ 23 (Res. App. at A-10), a date more than four months *after* he commenced this action (and more than two months after Skyline's motion for summary judgment was filed).

In granting Skyline's motion for summary judgment, the District Court found for Skyline on each of these issues. First, there was no basis for equitably tolling the 180-day limitation period because the evidence was uncontraverted that Skyline had conspiciously posted the required notice. Findings of Fact And Judgment of the Court ¶¶ 2-3, 6 (Pet. App. at C-8, C-9). Second, even if the equitable tolling doctrine were invoked, the limitation period began to run when Posey retained an attorney in connection with his termination, and the evidence was uncontroverted that that occurred no later than July 3, 1980, still more than 180 days before Posey first filed a charge with the EEOC. Memorandum And Order (Pet. App. at C-2). Third, it was undisputed that Posey had not filed a charge with the EEOC before commencing this action, let alone at least 60 days before as required by 29 U.S.C. § 626(d). Findings of Fact and Judgment of the Court ¶¶ 5, 6 (Pet. App. C-9).

On appeal, the Court of Appeals for the Seventh Circuit affirmed the District Court's judgment. In doing so, the Court of Appeals' opinion addressed only the first ground for the District Court's decision. It held that Posey had failed to demonstrate that a genuine issue of material fact existed with respect to whether Skyline had posted the required notice, and therefore whether the equitable tolling doctrine should be invoked. In the face of Skyline's affidavits unambiguously averring both that the required notice had been posted and that Skyline's business records so indicated, the Court held that:

> Posey's affidavit merely indicates that Posey never saw the ADEA notice, which is not the same thing as an averment that the notice was not in fact conspicously posted. . . . [Fed. R. Civ. P.] 56 . . . demands that Posey show *specific*

> facts indicating that a genuine issue does indeed exist for trial. . . . Unsupported by other evidence, Posey's averment that he never saw an ADEA poster . . . fails to go far enough to rebut Skyline's unambiguous affidavits.

(Pet. App. at A-6—A-7) (emphasis in original).

SUMMARY OF ARGUMENT

The decision of the Court of Appeals does not purport to establish a new standard for granting summary judgments, but rather holds, on the record presented, that Posey did not meet his burden under Fed. R. Civ. P. 56(e) to "set forth specific facts showing that there is a genuine issue for trial." That decision is correct, does not conflict with the decision of any other federal court, and does not merit review by this Court.

Even were the issue addressed by the Court of Appeals otherwise worthy of review, this would be an inappropriate case in which to do so. The judgment below is independently supported by each of two alternative grounds.

ARGUMENT

I. The Court of Appeals' Decision Is Correct, Does Not Conflict With The Decision of Any Other Federal Court, And Does Not Warrant Further Review.

Contrary to Posey's argument, the decision below neither establishes nor purports to establish "a new standard for granting summary judgments . . . ." Petition at 6. Rather, the Court of Appeals merely held, on the evidence presented, that Posey had not contradicted Skyline's affidavits that the requisite ADEA notice was posted, and therefore had not shown a "genuine issue for trial" as required by Fed. R. Civ. P. 56(e).

Mr. Herr's affidavit states unambiguously and on personal knowledge that the required notice had been continuously posted over the relevant period. (Res. App. at A-1—A-2). Mr. Szrom's affidavit states unambiguously and on personal knowledge that Skyline's business records also indicate that the notice had been continuously posted over the relevant period. (Res. App. at A-3).[3] As the Court of Appeals held, evidence that Posey did not see the notice does not contradict Skyline's evidence that the notice was in fact posted, and therefore does not demonstrate a genuine issue of fact. Even Posey argues only that his "affidavit must be construed as stating that Posey never saw an ADEA notice conspicuously and continuously posted in the employee's lunch room." Petition at 9. That states nothing about whether in fact it was posted.

The decision of the Court of Appeals does not conflict but rather accords with the decisions of other federal courts on this specific issue. *Gebhard v. GAF Corp.*, 59 F.R.D. 504, 507 & n.7

[3]Contrary to Posey's argument, Petition at 8, there are no "unexplained gaps" in Skyline's affidavits. Mr. Herr's affidavit avers directly and on personal knowledge that the notice was in fact posted. (Res. App. at A-1—A-2). Mr. Szrom's affidavit does not represent personal knowledge of *that* fact, but rather avers on the basis of personal knowledge that Skyline's business records are consistent with Mr. Herr's statements. (Res. App. at A-3).

(D. D.C. 1973) (in face of defendant's evidence that notice was posted, plaintiffs cannot avoid summary judgment on basis of evidence that "they did not see" the notice); *cf. Bonham v. Dresser Indus., Inc.*, 569 F.2d 187, 193 n.7 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978) ("[i]f the employer complied with the relevant posting regulations, an employee's assertion that he never saw any notices should not of itself require tolling of the 180-day period"). The decision below also accords with the standards employed by other federal courts in passing upon motions for summary judgment. *E.g., Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980) ("the mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the moving party"); *Gatling v. Atlantic Richfield Co.*, 577 F.2d 185, 188 (2d Cir. 1978), *cert. denied*, 439 U.S. 861 (1979) ("[t]he day when 'the "slightest doubt" as to the facts' stood in the way of the grant of summary judgment in this circuit is now gone"); *see* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2727 at 175-177 (1983).[4]

Furthermore, Posey bears the burden of proof on the equitable tolling issue, *see Saltz v. Lehman*, 672 F.2d 207, 209 (D.C. Cir. 1982) (equitable tolling of the analoguous limitation period of Title VII of the Civil Rights Act of 1964), and consideration of the allocation of the burden of proof is appropriate in ruling on a motion for summary judgment. 10A Wright, Miller & Kane, *Federal Practice and Procedure* § 2727 at 129-131 ("[i]n this sense the theory underlying summary judgment is similar to that of the directed verdict motion"). *See also, First Nat. Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968) (what "is required is that sufficient evidence

[4]This is not a case such as *United States v. Diebold, Inc.*, 369 U.S. 654 (1962), involving complex antitrust or other legal issues and a massive evidentiary record, which factors may counsel hesitation in granting a motion for summary judgment. *See generally*, 10A Wright, Miller & Kane, *Federal Practice and Procedure* §§ 2732-2732.1. The legal issue in this case is narrow and the evidentiary record quite simple.

supporting the claimed factual dispute be shown to require a judge or jury to resolve the parties' differing versions of the truth at trial"); *Hahn v. Sargent*, 523 F.2d 461, 468 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976) ("[t]here must be some indication that he can provide the requisite quantum of evidence to enable him to reach the jury with his claim").

The decision below holds that in the face of direct evidence that the required notice was posted, an employee's testimony that he "never saw" the notice is insufficient as a matter of law to carry his burden of proof on the issue, and thus to create a triable issue for the finder of fact. That decision is plainly correct, for were the rule otherwise, the equitable tolling doctrine would swallow the ADEA's 180-day limitation period for filing the required charge. The question whether an employee complied with that time requirement could never be resolved short of trial if his evidence that he "never saw" the required notice, standing alone, was sufficient to create a triable issue on the question whether the employer in fact posted it.

In dissenting from the Court of Appeals' decision, Circuit Judge Cudahy conceded that the issue as to the posting of the notice might be resolved "without need for trial." (Pet. App. at A-9). He argued, however, that "further discovery" was needed to determine the issue. (Id.) Thus, Judge Cudahy apparently conceded that Posey's affidavit, standing alone, was insufficient to demonstrate a triable issue of fact. If Posey's affidavit *were* sufficient to create a triable issue, then regardless of any evidence "further discovery" might adduce, that issue could *never* be resolved "without need for trial" contrary to Judge Cudahy's concession. If Posey's affidavit was insufficient to create a triable issue, however, this case was ripe for summary judgment. Posey did not seek postponement of a ruling on Skyline's summary judgment motion in the District court pending "further discovery," and he did not raise in his appeal an issue of abuse of discretion by the District Court for denying him an adequate opportunity for discovery.

II. The Judgment Below Is Supported By Two Alternative Grounds.

Entirely apart from the equitable tolling issue addressed by the Court of Appeals, the judgment below is supported by each of two adequate, independent and alternative grounds.

First, even were the ADEA's 180-day limitation period equitably tolled for failure to post the required notice, that period nevertheless began to run under the Seventh Circuit's tolling rule when Posey retained counsel. *Kephart v. Institute of Gas Technology*, 581 F.2d at 1289. The Seventh Circuit's tolling rule in this respect accords with that of the other Circuits which have considered the issue. *Bonham v. Dresser Indus., Inc.*, 569 F.2d at 193; *Edwards v. Kaiser Alum. & Chem. Sales, Inc.*, 515 F.2d 1195, 1200 n.8 (5th Cir. 1975).

The evidence in the instant case is uncontroverted that Posey first contacted counsel on April 7, 1980 (Res. App. at A-9), that Posey's counsel telephoned Mr. Lutz of Skyline Corporation regarding Posey's "termination" on July 3, 1980 (Res. App. at A-12—A-13), and that Posey did not file the statutorily-required charge until February 25, 1981 (Res. App. at A-10), which was not within 180 days of either April 7, 1980 or July 3, 1980. Accordingly, whether or not there existed a triable issue of fact with respect to the posting of the notice and therefore an equitable tolling of the 180-day limitation period, it is entirely uncontested that Posey did not comply with the 180-day limitation period even if it were equitably tolled. Skyline is, therefore, in any event entitled to summary judgment on this alternative ground, as the District Court held. (Pet. App. at C-2).

Second and apart from the 180-day limitation period, whether equitably tolled or not, it is entirely uncontested that Posey did not comply with 29 U.S.C. § 626(d)'s other requirement: That "[n]o civil action may be commenced . . . until 60 days after [the required] charge . . . has been filed with the

Commission." Posey commenced this action on October 10, 1980, over four months before the date, according to his own evidence, that he filed the required charge. (Res. App. at A-10).

Every Court of Appeals to have addressed this issue has stated that the statutory requirement that a charge be filed at least 60 days before an action is commenced is jurisdictional and, unlike the 180-day time limitation for filing the charge, cannot be waived or otherwise avoided. *Wright v. State of Tennessee,* 628 F.2d 949, 953 (6th Cir. 1980) (en banc) ("we adopt the construction of § 626(d) that while giving the Secretary of Labor at least 60 days' notice is a jurisdictional prerequisite, the time of filing this notice is not"); *Ewald v. Great Atl. & Pac. Tea Co., Inc.,* 620 F.2d 1183, 1188 (6th Cir. 1980); *Newcomer v. International Bus. Mach. Corp.,* 598 F.2d 968, 969 (5th Cir.), *cert. denied,* 444 U.S. 984 (1979) ("notice of intent to sue [under the former version of § 626(d)(1)] is a jurisdictional prerequisite to suit" — "equitable tolling [concerns] the time period for filing notice, not the waiver of the notice itself"); *Dartt v. Shell Oil Co.,* 539 F.2d 1256, 1260-61 (10th Cir. 1976), *aff'd by an equally divided court,* 434 U.S. 99 (1977) ("while Section 626(d)(1)'s notice . . . cannot be waived, the 180-day time limitation should be interpreted as subject to possible tolling and estoppel"). *See also Benima v. Smithsonian Institution,* 471 F. Supp. 62, 65-66 (D. Mass. 1979); *McCrickard v. Acme Visible Records, Inc.,* 409 F. Supp. 341, 344 (W.D. Va. 1976).[5] For this reason as well, summary judgment on behalf of Skyline was properly entered.

[5]The reason for that rule is that "[t]he thrust of the ADEA's enforcement provisions is that private lawsuits are secondary to administrative remedies and suits brought by the Secretary of Labor." *Rodgers v. Exxon Research & Engin. Co.,* 550 F.2d 834, 841 (3rd Cir. 1977), *cert. denied,* 434 U.S. 1022 (1978); *Reich v. Dow Badische Co.,* 575 F.2d 363, 368 (2d Cir.), *cert. denied,* 439 U.S. 1006 (1978); *see also, Lorillard v. Pons,* 434 U.S. 575, 578-80 (1978). Absent the required notice, the administrative conciliation and enforcement functions cannot be fulfilled.

Accordingly, even were the narrow issue decided by the Court of Appeals otherwise worthy of review, this would be an inappropriate case in which to do so. Regardless of the resolution of the issue addressed by that Court, the judgment below, for two other reasons, would have to be affirmed.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

AFFIDAVIT

STATE OF INDIANA
COUNTY OF ELKHART } ss:

Delven D. Herr, being first duly sworn, upon his oath deposes and says:

1. I am a resident of Elkhart County, Indiana, of adult age and competent.

2. I am employed by Skyline Corporation ("Skyline") as Division Manager of its Goshen plant which is located on U.S. Highway 33 South in Goshen, Indiana.

3. I have been so employed from February 19, 1977 to date.

4. Edward R. Posey worked as Plant Manager of the Goshen plant reporting directly to me, from October 1, 1977 through September 16, 1978.

5. My job is to exercise general supervision of Skyline's Goshen plant. Among my duties are to assure the Goshen plant compliance with applicable regulations of the United States Department of Labor and Equal Employment Opportunity Commission.

6. I know, of my own personal knowledge, that from and after February 19, 1977, there was continuously posted in the lunch room of the Skyline plant of which I am Division Manager, a notice of an individual's rights under the Age Discrimination in Employment Act. Said notice was conspicuously and continuously posted in the employees' lunch room, and was removed only to post new notices received from the office of Robert Szrom, Skyline's Vice-President of Human Resources and the United Stated Department of Labor or Equal Employment Opportunity Commission superseding that one replaced.

7. I know, based upon personal knowledge, that Edward R. Posey was Plant Manager of Skyline's Goshen facility from October 1, 1977 through September 16, 1978 and that he was physically in the lunch room from time to time and able to observe the aforementioned notice of rights under the Age Discrimination in Employment Act.

8. At no time while Mr. Posey was employed by Skyline and reporting to me, did Skyline consider age a factor in connection with Mr. Posey's employment.

/s/ DELVEN D. HERR
Delven D. Herr

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 13th day of November, 1980.

/s/ TINA L. MARSH
Tina L. Marsh, Notary Public,
Residing in Elkhart County, Indiana.

My Commission Expires: June 1, 1984

AFFIDAVIT

STATE OF INDIANA
COUNTY OF ELKHART } SS:

Robert F. Szrom, being first duly sworn, upon his oath, deposes and says:

1. I am of adult age, a resident of St. Joseph County, Indiana, and competent.

2. I am Vice President of Human Resources for Skyline Corporation ("Skyline") and have been employed by Skyline in such capacity since June 1976.

3. I make this affidavit based upon my personal knowledge or from the business records of Skyline, compiled in the regular course of its business and of which I am custodian.

4. Included in my responsibilities as Vice President of Human Resources are the making of periodic, unannounced visits to the corporation's facilities, including the Goshen plant at which Mr. Posey was employed until September 16, 1978, in order to ascertain that the operations in such facilities comply with applicable Federal, State and local requirements including the posting of notices required under the Age Discrimination in Employment Act.

5. Skyline records indicate that the requisite notice to employees of their rights under the Age Discrimination in Employment Act has been continuously posted in the Skyline plant in Goshen, Indiana, from at least August 1976, said date being the earliest for which I have appropriate records.

6. Edward R. Posey was employed at the Goshen facilities of Skyline as a Plant Manager from and after October 1, 1977, and until granted a medical leave of absence on September 16, 1978. In connection with his employment, he would be physically present in the employees' lunch room of the Goshen facility in which the notice regarding Age Discrimination in

Employment rights was posted. See attached photos accurately depicting the lunch room, which are made a part of this affidavit.

7. Submitted with this affidavit are true copies of the Age Discrimination in Employment Act notices furnished by the United States Department of Labor and, subsequently the Equal Employment Opportunity Commission, which notices were and are used by Skyline for the period commencing before August 1976, to date, and in Skyline's Goshen plant in particular.

8. On March 1, 1977, in a work-related accident Edward R. Posey aggravated a non-occupational injury to his left hip; the aggravation and prior injury required the surgical replacement of his left hip joint.

9. Edward R. Posey was granted a medical leave of absence, with pay, from Skyline commencing March 14, 1977, and ending October 1, 1977.

10. On October 1, 1977, Mr. Posey returned to work at the Skyline Goshen facility as Plant Manager.

11. As of September 16, 1978, as a result of medical complications from his hip replacement, Mr. Posey was given a medical leave with pay to September 30, 1978; and without pay thereafter until June 4, 1979.

12. On September 30, 1978, Mr. Posey was granted a medical leave without pay for an indefinite period.

13. In December 1978, Ronald D. Bland, a Director of Operations for Skyline, informed me that Mr. Posey had telephoned him and stated that he was ready to return to work. Mr. Bland asked that I determine available openings for either Quality Control Manager, Service Manager or possibly Foreman.

14. After reviewing the then available employment opportunities, I contacted Mr. Posey and offered him the

position of Quality Control Manager at a local plant. Mr. Posey telephoned me the following day and advised that his physician had not released him, and that he would not accept the Quality Control Manager position. I then advised Mr. Posey that when he was released by his physician, we would discuss any available employment opportunity then existing in the category of Foreman, Quality Control Manager or Service Manager, and he agreed that he would telephone me when released by his physician.

15. On June 4, 1979, at the request of Mr. Posey, his medical leave was cancelled and he was deleted as an employee of the corporation and his profit sharing benefits were paid to him.

16. At no time did Mr. Posey's age become a factor in connection with his employment. Until he voluntarily resigned from employment, Skyline was prepared to return him to work as soon as an opening in the position of Quality Control Manager, Service Manager or possibly Foreman existed and upon his being released to return to work by his attending physician.

/s/ ROBERT F. SZROM
Robert F. Szrom

STATE OF INDIANA
COUNTY OF ELKHART } ss:

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 13th day of November, 1980.

/s/ TINA L. MARSH
Tina L. Marsh, Notary Public
Residing in Elkhart County, Indiana

My Commission Expires: June 1, 1984

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
Northern District of Indiana
South Bend Division

EDWARD R. POSEY, *Plaintiff,*	
vs.	CIVIL NO. S-80-330
SKYLINE CORPORATION, *Defendant.*	

AFFIDVAIT OF EDWARD R. POSEY

1. Edward R. Posey, plaintiff in the above-identified civil action being first duly sworn, under oath, deposes and states as follows:

2. That he was hired by defendant, Skyline Corporation (hereinafter Skyline) on July 1, 1957, was promoted to assistant plant manager in 1965, to plant manager of Skyline in 1971 and is now fifty-seven years old.

3. That during his employ as plant manager of Skyline he always understood that he was well qualified for his position.

4. That on or about September 5, 1978, he injured his left leg and hip while inspecting a mobile home manufactured by Skyline, was unable to continue work, was admitted to the hospital for examination, tests and treatment by his physician, R. K. Ellis, M.D. and was given a medical leave of absence with pay by Skyline.

5. That on or about October 13, 1978, his pay from Skyline ceased and unbeknown to him his employment with Skyline was terminated.

6. That during December, 1978, being desirous of returning to work, he called Ronald D. Bland, Director of Operations for Skyline by telephone and told Mr. Bland that he was ready to return to his position as plant manager and that Mr. Bland told him to contact Robert F. Szrom and set a date for an interview which he made. However, before the date of the interview, he contacted his physican and after discussing going back to work with his physician who would not release him, he told Mr. Szrom of Skyline that he could not accept any employment because he had not yet been released by his physician.

7. That he never was offered a position as plant quality control manager as stated in the affidavits of Ronald D. Bland (para. 6) and Robert F. Szrom (para. 14) submitted with Skyline Corporation's motion.

8. That after he was released by his physician, R. K. Ellis, M.D., to return to and assume his position as plant manager at Skyline he contacted Mr. Bland on June 4, 1979, regarding such position, but he was told by Mr. Bland that there were no positions open as plant manager. That he then told Mr. Bland that he would accept a position as plant manager anywhere in the country. In response he was told by Mr. Bland "Don't you understand you (Edward R. Posey) were terminated on October 13, 1978, when Skyline stopped paying you your salary." and that he, Edward R. Posey, replied, "You mean after twenty-two years of service I was terminated without notice." and that Mr. Bland stated, "Yes." and that he then asked Mr. Bland why he was terminated on October 13, 1978, and Mr. Bland responded that he was terminated because of his age and because he was not in good enough health.

9. That he was in excellent health on June 4, 1979, except for being handicapped with an artificial left hip joint which caused him to limp.

10. That he did not inquire whether "any employment opportunities were then available" as stated in the Bland affidavit (para. 7) but instead stated that he was ready to go back to work as plant manager and further that Mr. Bland never advised him "that his limitations", as stated in paragraph 7 of the Bland affidavit "including the effects of measures required to treat his physical condition, would not permit him to satisfactorily perform the responsibilities of Plant Manager".

11. That Mr. Bland also told him, that although Skyline had been carrying him since October 13, 1978, on the group insurance policy, that Skyline could no longer carry him and that it would be necessary for Skyline to discontinue his insurance.

12. That inasmuch as he was advised by Mr. Bland that his employment with Skyline was terminated on October 13, 1978, and that his group insurance benefits would also be terminated, he then inquired when he could obtain his profit-sharing plan benefits which benefits he obtained several months later but that he never requested that his medical leave be cancelled and that he be deleted as an employee of Skyline (See Szrom Affidavit, para. 15).

13. That he never asked Skyline to terminate his employment so that he could obtain his profit-sharing plan benefits and never voluntarily resigned his employment with Skyline (See Bland Affidavit, para 8).

14. That prior to withdrawing his profit-sharing plan benefits from Skyline, he was notified by Skyline and was of the belief that, even though he would withdraw his benefits, that he would still in the future be rehired as plant manager when the first opening occurred.

15. That at the time of executing the papers with Skyline to obtain his profit-sharing plan benefits, he was unaware and did not have any knowledge that any of his civil rights were

being violated or that Skyline was violating a statute because he expected to be rehired by Skyline.

16. That he frequently, i.e., almost every working day, glanced at the posters on the bulletin board in the employees' lunch room adjacent to the plant's production area of the Goshen plant where he was plant manager prior to September 5, 1978, and promptly read any new posted notices, and that he never saw and does not recall ever reading a notice to employees of their rights under the Age Discrimination in Employment Act as stated in the affidavits of Robert F. Szrom and Delvin D. Herr.

17. That he first learned in 1980 that at least one opening occurred for a position of plant manager with Skyline after June 4, 1979, and that a person under age forty was hired for such position, but that such opening was concealed from him and that he was never contacted by Skyline whether he was interested in accepting such position.

18. That after he ceased to receive his salary from Skyline, he started receiving workmen's compensation benefits of approximately $104 per week until April 7, 1980.

That while being employed by Skyline, he was covered by a group medical insurance policy but after being injured on September 5, 1978, and after he ceased receiving his salary from Skyline from about October 13, 1978, he failed to receive any weekly medical benefits of $75.00 per week as stated in the insurance policy.

19. That after he stopped receiving workmen's compensation benefits on April 7, 1980, he contacted his attorney, John J. Gaydos, and inquired whether he was entitled to any weekly medical benefits because of his being insured under a group insurance policy by Skyline and whether he could receive any additional workmen's compensation benefits.

20. That as to receiving weekly medical benefits of $75.00 per week as stated in the group insurance policy, he was

informed that the insurance company and Skyline refused to grant him any weekly medical benefits and that of this date he still has not received any weekly medical benefits as stated in the group insurance policy nor did he receive any additional workmen's compensation benefits.

21. That on or about September 18, 1980, while consulting with his attorney, John J. Gaydos, he was told by his attorney that a civil rights statute entitled Age Discrimination in Employment Act prevents an employer from terminating an employee over age forty without cause and that his attorney after reviewing the facts surrounding his termination concluded that Skyline was in violation of the civil rights statute because on or about October 13, 1978, Skyline terminated his employment even though Skyline did not know when he would fully recuperate from his injury and be ready to return to work.

22. That in further discussing the age discrimination statute with his attorney, he authorized his attorney to file a complaint as soon as possible and that such complaint was filed in the District Court on October 10, 1980.

23. That on February 25, 1981, he sent notice (See attached copy of letter) to the Secretary of Labor and to the Department of Labor apprising them of the charge that he has made against Skyline for age discrimination in terminating his employment and enclosed a copy of his complaint.

Further deponent sayeth not.

/s/ EDWARD R. POSEY

Edward R. Posey

STATE OF INDIANA
COUNTY OF ELKHART } SS:

Subscribed and sworn to before me, a Notary Public in and for said County and State this 2nd day of March, 1981.

/s/ SANDRA M. WYSONG

Sandra M. Wysong, Notary Public,
Residing in Elkhart County.

My Commission Expires: September 8, 1984.

AFFIDAVIT

STATE OF INDIANA
COUNTY OF ELKHART } ss:

John R. Lutz, being first duly sworn upon his oath, deposes and says:

1. I am a resident of Elkhart County, Indiana, of adult age and competent.

2. I am Assistant General Counsel of Skyline Corporation.

3. I attach to and make a part of this Affidavit, true copies of two letters from John J. Gaydos, dated July 14, 1980, and October 2, 1980, respectively, which copies I certify to be accurate reproductions of the originals in my file.

4. The written notations on the letter of July 14, 1980, were made by me or other personnel at Skyline Corporation on the original; but, of course, were not a part of the letter from John J. Gaydos at the time of its receipt by Skyline Corporation.

/s/ JOHN R. LUTZ
John R. Lutz

Subscribed and sworn to before me, a Notary Public in and for said County and State, this 6th day of March, 1981.

/s/ R. MICHAEL PARKER
R. Michael Parker, Notary Public
Residing in Elkhart County, Indiana

My Commission Expires: October 7, 1981

July 14, 1980

Jack Lutz, Esq.
Legal Department
Skyline Corporation
2520 Bypass Road
Elkhart, Indiana 46514

Re: Edward R. Posey

Dear Jack:

During our telephone conversation of July 3, 1980, regarding termination of Edward R. Posey, I forgot to ask you for a copy of the policy covering Skyline Corporation's group insurance plan. Immediately after our conversation, I called you back but your line was busy. I then asked your secretary to check with you and send me a copy of the policy. As of this date I have not received a copy of the policy.

Accordingly, I would appreciate your sending me a copy of the insurance policy covering the group insurance plan of Skyline Corporation.

Thank you for your consideration.

Very truly yours,

HERRON & GAYDOS

/s/ JOHN J. GAYDOS
John J. Gaydos

JJG:br